IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34668

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 557**
	)	
Plaintiff-Respondent,	)	**Filed: July 18, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
ROBERT ELOY PENA,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Minidoka County. Hon. R. Barry Wood, District Judge.

Order revoking probation and requiring execution of unified fifteen-year sentence with five-year determinate term for felony domestic battery, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

PER CURIAM

Robert Eloy Pena pled guilty to felony domestic battery, I.C. § 18-918(2), before District Judge Melanson. The district court, however, entered a judgment of conviction indicating that Pena pled guilty to felony domestic battery in the presence of children, I.C. §§ 18-918(2)(a), 18-918(4), and 18-903. The district court imposed a unified fifteen-year sentence, with a five-year determinate term, but after a period of retained jurisdiction, suspended the sentence and placed Pena on probation. Subsequently, Pena admitted to violating the terms of his probation before District Judge Wood. The district court consequently revoked probation and ordered execution of the originally imposed, but suspended, fifteen-year sentence. Pena appeals, contending that the district court abused its discretion in revoking probation and arguing that his sentence is illegal.

It is within the trial court's discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; *State v. Beckett*, 122

Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); *State v. Adams*, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); *State v. Hass*, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation a court must examine whether the probation is achieving the goal of rehabilitation and consistent with the protection of society. *State v. Upton*, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *Hass*, 114 Idaho at 558, 758 P.2d at 717. The court may, after a probation violation has been established, order that the suspended sentence be executed or, in the alternative, the court is authorized under Idaho Criminal Rule 35 to reduce the sentence. *Beckett*, 122 Idaho at 326, 834 P.2d at 328; *State v. Marks*, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. *Beckett*, 122 Idaho at 326, 834 P.2d at 328. Applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion in revoking probation.

Pena also asserts that his sentence is illegal.[1] According to the transcript of the change of plea proceeding, Pena pled guilty to felony domestic violence for which the maximum sentence he could receive was ten years. However, according to the written judgment of conviction, Pena was sentenced to a term of fifteen years for domestic violence in the presence of children. The state contends that Pena has not challenged the legality of his sentence by filing an I.C.R. 35 motion to correct an illegal sentence before the district court and that no disposition hearing has been held. Thus, the state asserts Pena has not preserved this issue for appeal.

Pursuant to Rule 35, the district court may correct an illegal sentence at any time. In an appeal from the denial of a motion under Rule 35 to correct an illegal sentence, the question of

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[1] Counsel for Pena on appeal claims that the issue, as phrased, is not an assertion that Pena's sentence is "illegal." Rather, as phrased, the assertion is that Judge Wood "abused his discretion" by executing Pena's suspended sentence because it exceeds the statutory maximum. Therefore, according to Pena, Judge Wood acted outside the boundaries of his discretion in determining what sentence would be appropriate upon revocation of probation. We are unpersuaded. We conclude that this is simply a veiled attempt to raise an issue not properly preserved for appeal. Without the discrepancy being brought to his attention by trial counsel, Judge Wood properly relied on the written judgment of conviction. The trial courts are under no obligation to sua sponte order a transcript of the change of plea hearing, compare it to the judgment of conviction, and verify its accuracy. In fact, alert trial counsel should have noticed the discrepancy at the sentencing hearing before Judge Melanson and remedied the situation at that time.

whether the sentence imposed is illegal is a question of law freely reviewable by the appellate court. *State v. Josephson*, 124 Idaho 286, 287, 858 P.2d 825, 826 (Ct. App. 1993); *State v. Rodriguez*, 119 Idaho 895, 897, 811 P.2d 505, 507 (Ct. App. 1991). A sentence is "imposed" when it is initially pronounced, even if its execution has been postponed. *State v. Omey*, 112 Idaho 930, 932, 736 P.2d 1384, 1386 (Ct. 1987). The appropriate method to obtain clarification of a sentence is to request such clarification from the court that imposed the sentence. *State v. Hoffman*, 137 Idaho 897, 903, 55 P.3d 890, 896 (Ct. App. 2002). A claim of an illegal sentence is not an issue that may be presented for the first time on appeal. *State v. Martin*, 119 Idaho 577, 579, 808 P.2d 1322, 1324 (1991). Should Pena wish to bring this question to the district court, he may do so under Rule 35. *See Hoffman*, 137 Idaho at 903, 55 P.3d at 896. Therefore, Pena is not entitled to relief on this appeal regarding his sentence.[2]

Therefore, the order revoking probation and directing execution of Pena's previously suspended sentence is affirmed.

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[2] Although the proposed modification of Pena's sentence, from a unified fifteen years to a unified ten years, provides him no immediate relief, we again pause to express our concern over counsel's approach to the sentencing issue. The most expeditious approach would always be for a defendant's trial counsel to immediately file a Rule 35 motion upon noticing such a discrepancy, especially in cases where a defendant's release from incarceration would be affected.